

ESTTA Tracking number: **ESTTA402070**

Filing date: **04/06/2011**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	77850772
Applicant	Poly-Gel L.L.C.
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Submission	Reply Brief
Attachments	ARCTIC HEAT, Tmk. Appl. 77-850,772-Reply Appeal Brief (4-6-2011).PDF (4 pages)(239035 bytes)
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application of: POLY-GEL L.L.C.

SERIAL NO.: 77/850,772

FILED: OCTOBER 16, 2009

MARK: ARCTIC HEAT

INTERNATIONAL CLASS: 10

TRADEMARK ATTORNEY: CHARISMA HAMPTON/LAW OFFICE 112

REPLY BRIEF

Hon. Commissioner for Trademarks
United States Patent and Trademark Office
P. O. Box 1451
Alexandria, Virginia 22313-1451

To the Trademark Trial and Appeal Board:

I. Introduction

On January 19, 2011, Applicant, Poly Gel, LLC, Appellant herein, timely filed a *Notice of Appeal* from the final refusal-to-register, and on January 24, 2011, Applicant filed its supporting *Appeal Brief*. On March 18, 2011, the Examining Attorney filed her responsive *Appeal Brief*. Applicant now files its *Reply Brief* and respectfully requests that the Trademark Trial and Appeal Board reverse the Examining Attorney's decision not to pass Appellant's trademark to publication.

II. Applicant's Rebuttal to the Examining Attorney's Appeal Brief

The Descriptive Nature of the Terms of the Respective Marks of Applicant and of the Applied Registration Renders Potential Confusion Unlikely, Notwithstanding Common Elements of the Marks Under Consideration

Appellant's position, as detailed in its principal *Appeal Brief*, is that the terms "ARCTIC" and "HEAT" are submitted to be weak and therefore not entitled to broad scopes of protection, inasmuch as such terms are intended to signify coolness and warmth. See, *In re Seabrook Foods, Inc. v. Bar-Well Foods Ltd.*, 568 F.2d 1342, 1346, 196 USPQ 289, 292 (C.C.P.A. 1977) ("Arctic' and the penguin on Bar-Well's mark conveys the impression of frozen goods."); *Emerson Electric Co. v. Emerson Quiet Kool Corp.*, 577 F.Supp. 668, 677, 221 USPQ 782, 789 (E.D. Mo. 1983) ("[T]he words 'quiet heat' are merely descriptive when used in connection with the sale of kerosene space heaters.") Appellant had cited to *In re Nantucket, Inc.*, 677 F.2d 95, 107 n. 8, 213 USPQ 889, 893-894 n.8 (C.C.P.A. 1982), in its principal *Appeal Brief* (at 5), in which the Court of Customs and Patent Appeals noted that "ARCTIC" may be a useful trademark for marketing refrigerators, implicitly because of the cold conditions associated with the Arctic region. The Examining Attorney dismissed the relevance of *In re Nantucket* in the *Examining Attorney's Appeal Brief* as constituting mere speculation, nevertheless the point that "Arctic" is generally viewed as descriptive of coldness is submitted to be self-evident and widely accepted.

Appellant's goods, as recited in its trademark application, include "[t]herapeutic hot and cold compression wraps for cooling or warming parts of the human body." The goods of U.S. Trademark Reg. No. 2,944,243, the registration applied in the Examining

Attorney's final refusal-to-register, include "cooling and heating rehabilitation packs" and "cooling and heating jackets and vests." Neither the goods nor the marks of Appellant and the applied registration are the same. The common elements of "ARCTIC" and "HEAT" for different goods which have both cooling and warming features should therefore be neither surprising nor a source of confusion. See, *Nestles Milk Products, Inc. v. Baker Importing Co.*, 37 CCPA 1066, 182 F.2d 193, 86 USPQ 80 (1950) (the presence of a common element of allegedly conflicting marks that is a word that is "weak" reduces the likelihood of confusion); *Knapp-Monarch Co. v. Poloron Products, Inc.*, 134 USPQ 412 (T.T.A.B. 1962) (portion of a mark may be "weak" in the sense that such portion is descriptive, highly suggestive or is in common use by many other sellers in the market).

While the Examining Attorney has opined that "ARCTIC HEAT" is an "arbitrary incongruous term that has no definable meaning," the terms "ARCTIC" and "HEAT" have long been recognized as being descriptive of coldness and warmth, and in light of the goods of Appellant and those recited in the applied registration – which exhibit both coolness and warmth – the selection of such terms cannot fairly be viewed as being arbitrary.

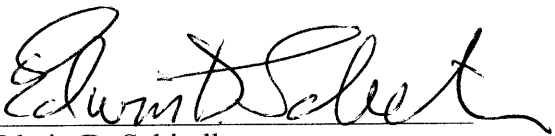
Accordingly, when properly considered as descriptive terms as applied to the relevant goods, the respective marks under consideration are submitted to be entitled to only narrow scopes of protection which should be seen as avoiding any likelihood of confusion.

III. Conclusion

In light of the foregoing, it is respectfully contended that the Examining Attorney's refusal-to-register under §2(d) of the Trademark Act, pertaining to the Examiner's contention that Appellant's trademark "ARCTIC HEAT" is confusingly similar to the mark of U.S. Trademark Registration No. 2,944,243, should now be reversed by the Trademark Trial and Appeal Board, in view of the relatively narrow scopes of protection that should properly be afforded Appellant's mark and that of the applied registration, and the trademark of the instant trademark application should now be passed to publication. Such favorable action is respectfully requested and earnestly solicited.

Respectfully submitted,

POLY GEL, LLC

By 
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April 6, 2011

The Commissioner for Trademarks is hereby authorized to charge the Deposit Account of Applicant's Attorney, Account No. 19-0450, for any fees which may be due in connection with the prosecution of the above-identified trademark application, but which have not otherwise been provided for.